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VIA ELECTRONIC AND U.S. MAIL

Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Proposed Regulations Related to Assembly Bill 646

Dear Mr. Chisholm:

This letter is in response to your request for written comments related to the Public Employment Relations Board (PERB)'s consideration of emergency rulemaking to implement California Assembly Bill 646 (2011-2012 Reg. Session) (Assembly Bill 646), which was recently adopted by the California Legislature and signed by the Governor.

As you are aware, when a statute empowers an administrative agency to adopt regulations, the regulations must be consistent, not in conflict with the statute. *Ontario Community Foundation, Inc. v. State Board of Equalization*, 35 Cal. 3d 811, 816 (1984) (quotations and citations omitted). There is no agency discretion to promulgate a regulation that is inconsistent with the governing statute. *Id.* The California Supreme Court has stated, "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967)).

As attorneys for the City of San Diego, it is our view that there is no language in Assembly Bill 646 that mandates factfinding when a public agency employer and a recognized employee organization are at impasse and they do not mutually agree to mediation.

Assembly Bill 646 left intact California Government Code (Government Code) section 3505.2, which makes mediation between the parties discretionary, not mandatory. Section 3505.2 provides, in pertinent part, with italics added:

If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together *may agree* upon the appointment of a mediator mutually agreeable to the parties.

Cal. Gov't Code § 3505.2.

“May” is permissive, not mandatory. Cal. Gov't Code § 14.

Under Assembly Bill 646, if the parties agree to mediation and the mediation does not result in settlement within thirty days after the mediator's appointment, then an employee organization may request that the parties' differences be submitted to factfinding. Assembly Bill 646 does not mandate factfinding where mediation is not agreed upon by the parties, and PERB may not extend a factfinding mandate or authorization beyond the limited circumstances provided in the bill.

The language of the newly-adopted Government Code section 3505.7 supports this interpretation. Section 3505.7, which becomes effective in January 2012, provides, in pertinent part, with italics added:

After *any applicable* mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties . . . a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding.

If mediation and factfinding procedures are not applicable, then the timing of the submission of the factfinders' written findings is not relevant, and a public agency, not required to proceed to interest arbitration, may implement its last, best, and final offer after holding a public hearing regarding the impasse.

Assembly Bill 646 did not modify the language of Government Code section 3507, which provides, in part, that:

(a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

The rules and regulations may include provisions for all of the following:

....

(5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

Cal. Gov't Code § 3507.

Assembly Bill 646 also did not modify Government Code section 3500(a), which provides, in part, that nothing in the Meyers-Milius-Brown Act (MMBA) "shall be deemed to supersede . . . the charters, ordinances, and rules of local public agencies . . . which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter." Cal. Gov't Code § 3500(a).

The City of San Diego has a specific impasse procedure that has been negotiated with the City's recognized employee organizations in accordance with the MMBA, and approved by the San Diego City Council (City Council). The impasse procedure does not mandate or even discuss mediation, and mediation has not been used in the past in the City.


The City's impasse procedure states that if the meet and confer process has resulted in an impasse, either party may initiate the impasse procedure by filing with the City Council a written request for an impasse meeting and a statement of its position on all disputed issues. San Diego City Council Policy 300-06, art. VII, Employee-Employer Relations, at 10 (amended by San Diego Resolution R-301042 (November 14, 2005)). An impasse meeting must then be held to identify and specify in writing the issue or issues that remain in dispute, and to review the position of the parties in a final effort to resolve such disputed issue or issues. *Id.* If the parties do not reach an agreement at the impasse meeting, impasses must then be resolved by a determination of the City's Civil Service Commission or the City Council after a hearing on the merits of the dispute. *Id.* Determination of which body resolves a particular impasse is dependent upon the subject matter of the impasse and applicable provisions of the San Diego Charter and San Diego Municipal Code. *Id.*

It has been suggested by others that Assembly Bill 646 leaves unclear the applicability of factfinding when the public agency employer and employee organization do not agree to mediation. It is this Office's view that the legislation is clear on its face: factfinding is not required when the negotiating parties do not agree to mediation. In our opinion, any PERB regulation that mandates factfinding where it is not required would overstep PERB's rulemaking authority.

Thank you for your consideration of this comment.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By 
Joan F. Dawson
Deputy City Attorney

JFD:ccm

cc: Patrick Whitnell, General Counsel, League of California Cities
(via electronic and U.S. Mail)